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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ERIC DAVEON BYRD, Defendant and Appellant.	2d Crim. No. B231350 (Super. Ct. No. YA075667-01) (Los Angeles County)

Eric Daveon Byrd appeals his conviction by jury for first degree premeditated murder (Pen. Code, § 187, subd. (a) 189) [1] with gang (§ 186.22, subd. (b)(1)(C)) and firearm enhancements (§§ 12022.53, subds. (b) – (e)). Appellant was sentenced to 50 years to life state prison and claims the trial court committed evidentiary and instructional error. We affirm with directions to modify the abstract of judgment to reflect that appellant must serve a minimum of 15 years before he is eligible for parole. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

Facts and Procedural History

On the evening of June 1, 2008, Emmett Love, Jr. was shot in the back of the head at a bus stop in Los Angeles. Jackie Wynn heard the gunshot, saw Love fall to the ground, and saw a small black man run to a four-door Mercedes parked in front of a church.

[1] All statutory references are to the Penal Code unless otherwise stated. Appellant was jointly tried with Rayvon Richardson.

The shooting was to avenge the May 31, 2008 killing of Derrick Chambers (aka Baby Hangout), a member of the Denver Lanes Bloods gang (Denver Lanes). Appellant (aka Tick Tock) was a member of the Crenshaw Mafia gang which was affiliated with the Denver Lanes.

On the evening of May 31, 2008, appellant visited a Denver Lanes apartment and announced that Chambers had been killed. Appellant believed that Hoover gang members killed Chambers and wanted to retaliate. Kaitlyn Weisberg, a prostitute who hung out with the Denver Lanes, overheard appellant say "I'm going to go get someone for you, Baby Hangout." People in the apartment made phone calls to locate a handgun.

On June 1, 2008, a candlelight vigil was held for Chambers. Appellant and Denver Lane gang members Rayvon Richardson (aka Chaos) and Kaycee Plourde (aka Half-Pint) attended the vigil and left in a black four-door Mercedes after a gang member (Shady) gave Plourde a "big old Western revolver." Plourde handed the revolver to appellant who said, "Man, I need this. I have to do this."

Appellant saw "some kids"" at a bus stop on Century and Vermont and got out to see if they were Hoovers. Richardson drove around the block and appellant got back into the Mercedes. Appellant said "the kids were gone" and directed Richardson to "keep going."

Further down on Vermont Avenue, appellant saw a black man (Emmett Love) at a bus stop. Appellant told Richardson to stop to "see if that guy was from Hoover." Appellant got out, shot Love, and ran back to the car. Appellant, Richardson, and Plourde tried to drive back to the vigil but ran out of gas.

Appellant visited the Denver Lanes apartment later that night. He was drunk and high. Weisberg heard appellant say "I just killed a Snoover nigger" at a bus stop.[2] Kissing his gun, appellant said "That was for you Baby Hangout."

[2] "Snoover" is a derogatory term for a Hoover.

Plourde left the Denver Lanes in 2009 and told the police that appellant was the shooter and Richardson the driver. Plourde was granted immunity and placed in a witness protection program.

Appellant was arrested a year after the shooting and told Denver Lanes gang member Derrick Kelley (Weisberg's boyfriend and pimp) about the shooting. The June 24, 2009 jailhouse conversation was surreptitiously taped. Appellant said that "Half-Pint [Plourde] was supposed to jump out. . . . I really did that shit, I really did that shit." Kelley asked, "Who all was with you?" Appellant responded, "Half-Pint and Chaos [Richardson]. [¶] . . Yeah, Half-Pint froze up, Half-Pint fucked up. Half-Pint was supposed to jump out. . . . The car ran out of gas on 108th [Street]." Appellant suspected that Plourde talked to the police because "[t]hey know too much. They know some shit I don't even remember."

"A gang expert, Inglewood Police Officer Kerry Tripp, testified that the Crenshaw Mafia and Denver Lanes were criminal street gangs whose primary criminal activities included murder, rape, drug sales, and robbery. Appellant had a "Crip Killer" tattoo that referred to the Hoover Crips. "Crab" was a derogatory name for a Crip and signified that appellant hated Crip gang members and wanted them all to die. Officer Tripp opined that the shooting was committed for the benefit of the Crenshaw Mafia gang, to earn respect, and to enhance the shooter's stature in the gang.

Evidence was received that Derrick Chambers (aka Baby Hangout), who was shot on May 31, 2008, was Richardson's close friend. Richardson had a tattoo that said "D.L.I.P. Baby Hangout." D.L.I.P stood for "Denver Lane in Peace." Los Angeles Police Detective Peter McCoy opined that Love was shot to avenge Chambers' death.

Appellant denied shooting Love and claimed that he did not match the shooter's description. With respect to the jailhouse recording, appellant stated that he merely told Kelley what he heard from the detectives and on the street. When appellant told Kelley that he was with Half-Pint and Chaos, he meant to say they sat in the Mercedes outside the candlelight vigil drinking and listening to music.

The jury was unable to agree on a verdict as to Richardson but convicted appellant of first degree murder with gang and weapon enhancements.

CALCRIM 335 Accomplice Instruction

Appellant contends that the trial court erred in instructing that Plourde was an accomplice and that her testimony could not be used to convict Richardson or appellant unless corroborated by other evidence. (CALCRIM 335.) The trial court found that Plourde was an accomplice as a matter of law and gave a modified CALCRIM 335 instruction stating that Plourde was "an accomplice[]" and "an aider and abettor" and that her testimony should be viewed with caution.

Appellant argues that the instruction undermined a crucial aspect of his defense i.e., that Plourde may have been the shooter and was trying to shift the blame to appellant. The eyewitness to the shooting, Jackie Wynn, saw a small black man run to the Mercedes moments after Love was shot. Appellant claimed that the it could have been Plourde based on her weight, height, and hair style.[3]

CALCRIM 335 must be given where the trial court finds or the parties agree a witness is an accomplice as matter of law. (See Judicial Council of Cal. Crim. Jury Instrns. (2012) Bench Notes to CALCRIM No. 335, p. 116; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161.) That was the case here. Richardson argued there was no evidence to corroborate Plourde's testimony that he was the driver. Appellant agreed that Plourde was an accomplice[4] and did not object to the CALCRIM 335 instruction that her testimony must be viewed with caution.

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[3] Appellant was five feet four inches tall and weighed 125 pounds. Wynn testified that shooter was a small black man, about four foot eight inches tall with short hair, and wearing shorts and a white T-shirt. Pourde was five feet one inch tall and weighed 101 pounds. Plourde testified that she was wearing pants (possibly shorts) and a sweater, and had a "poofy" ponytail that reached her neck. No one testified that Plourde got out of the Mercedes, looked like a man, or had short hair.

[4] Before Plourde testified, appellant argued that counsel should be appointed to represent Plourde "even with use immunity. She is still susceptible to prosecution on this case. She was one of three people that were in the car. She actually handled the gun for a split

The trial court also gave CALCRIM 334 which instructed that before the jury considered appellant's testimony "as evidence against defendant Richardson regarding the crime in [count] 1, murder, you must decide whether [appellant] was an accomplice to that crime[]." (See *People v. Avila* (2006) 38 Cal.4th 491, 561-562 [CALCRIM 334 must be given where codefendant's testimony tends to incriminate another defendant].) Read together, the instructions stated that Plourde's testimony as an accomplice was to be viewed with caution and had to be corroborated (CALCRIM 335), and the jury must decide whether appellant was an accomplice to the shooting (CALCRIM 335). The trial court instructed: "Pay careful attention to all of these instructions and consider them together." (CALCRIM 200.)

Appellant complains that the CALCRIM 335 instruction limits Plourde's accomplice liability to the role of aider and abettor, thus undermining the defense theory that Plourde may have been the shooter. But appellant failed to object, forfeiting the alleged instructional error. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023 [failure to seek modification forfeits error on appeal]; *People v. Battle* (2011) 198 Cal.App.4th 50, 64 [argument that accomplice instruction should have been given forfeited by failure to object].)

Appellant asserts that instructional error is not waived where it results in a miscarriage of justice or violates a defendant's due process rights. (*People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) The standard of review is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399] (*McGuire*); *People v. Clair* (1992) 2 Cal.4th 629, 663.) "'The only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' [Citation.]" (*McGuire*, *supra*, 502 U.S. at p. 72 [116 L.Ed.2d at p. 399].)

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second. Then they left the scene of the memorial, they went looking for a Hoover Crip to kill. So I don't see how she could not be an accomplice. If not an aider and abettor, an accomplice after the fact."

Reviewing CALCRIM 335 not " 'in artificial isolation' " but "in the context of the instructions as a whole and the trial record," we conclude there is no reasonable likelihood that the jury misapplied the instruction. (*Ibid.* [116 L.Ed.2d at p. 399].) CALCRIM 335 "was given to make clear that [Plourde] was being labeled an accomplice for purposes of the rule requiring corroboration if her testimony were believed. The instruction could not reasonably be understood as precluding rejection of her testimony — including rejection based on a conclusion that in fact she was the killer. [Citation.] Defendant's interpretation of the instruction would make it practically a direction of conviction. Yet the jury was fully instructed on the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt." (*People v. Heishman* (1988) 45 Cal.3d 147, 162-163.)

Appellant complains that the jury was instructed that an accomplice could either be a direct perpetrator (i.e., the shooter) or an aider and abettor. (CALCRIM 334.) That instruction, however, referred to appellant, not Plourde. No one argued that CALCRIM 335 settled the question of who was the shooter. Appellant claimed that Plourde shot Love and was trying to blame the killing on appellant because he was drunk and not a member of the Denver Lanes. Appellant argued that the shooting suspect "was 4-feet-eight, skinny, looked like a kid," which more closely resembled Plourde.

The jury rejected the argument and found that appellant personally and intentionally discharged a firearm which proximately caused the death of Emmett Love. (§ 12022.53, subds. (d) & (e)(1).) Had the trial court not given CALCRIM 335, it is clear beyond a reasonable doubt that a rational jury would have found appellant guilty. (*Neder v. United States* (1999) 527 U.S. 1, 18 [144 L.Ed.2d 35, 52-53]; *People v. Cox* (2000) 23 Cal.4th 665, 677, fn. 6.) There is no merit to argument that the CALCRIM 335 instruction, as modified, denied appellant a fair trial.

Confrontation Clause

Appellant contends that the trial court erred in receiving testimony that gang member Derrick Kelley told Detective Hecht that appellant was responsible for Love's death. After appellant was booked, Detective Hecht seated appellant and Kelley

together on a bench hoping they would talk about the shooting. When appellant went to use the restroom, Detective Hecht spoke to Kelley for about 15 minutes. Kelley returned to the bench and resumed his conversation with appellant which was surreptitiously recorded. Appellant told Kelley that he was with "Half-Pint and Chaos," that "I really did that shit," and that the detectives "know too much" about the shooting.

Appellant claimed that Detective Hecht fed him information about the shooting that appellant "parroted" back to Kelley. "It's defense's position that [appellant] was basically just parroting, mimicking,, telling Kelley what he had heard Detective Hecht tell him." Appellant claimed that Detective Hecht also provided Kelley information to get appellant to talk about the shooting.

The prosecution, in rebuttal, pointed out that Kelley had identified appellant as the shooter in two prior recorded statements. Appellant argued that the prior statements were hearsay and inadmissible.

Overruling the objection, the trial court stated that the defense is "try[ing] to get the jury to draw an inference that Kelley really didn't know anything about this were it not for Hecht feeding him this information. [¶] . . . [¶] If [Kelley] doesn't testify the detective fed information to [appellant], then what went on with Kelley is not relevant. But if you get into Kelley, then so can [the prosecution]."

Appellant's trial attorney questioned Detective Hecht about the detective's June 24, 2009 jailhouse interview with appellant. Counsel for Richardson cross-examined Detective Hecht about Kelley's prior statements and asked: "Did you tell Kelley to ask [appellant] who was driving?" Detective Hecht responded, "No."

On re-direct, the prosecution asked Detective Hecht to clarify his testimony: "You spoke with Derrick Kelley on two occasions prior to this day [i.e. June 24, 2009] that you guys did the recording in jail; is that right?" Detective Hecht answered "That's correct."

The prosecution then asked: "And when you spoke with Derrick Kelley, did he tell you who did – who shot Mr. Love at the bus stop? The trial court sustained an objection and the following questions were asked:

"Q. What did he tell you about Half Pint?

"A She was in the car.

"Q With who?

"A With Tick Tock [appellant].

"Ms. Fraser [appellant's co-counsel]: Objection.

"The Court: Overruled.

"By Ms. Barnes [the prosecutor]:

"Q When?

"A. The day of the shooting. He told me that Half Pint and Tick Tock were in the car and they're the ones – and Tick Tock was responsible for the murder of the gentlemen at the bus bench, Mr. Love."

"Mr. Kim [appellant's counsel]: Continuing objection. Move to strike.

"The Court: Evidence Code section 356. Overruled."

Appellant did not ask for a limiting instruction (Evid. Code, § 355) and the trial court had no sua sponte duty to give one. (See e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 479.) Evidence Code section 355 states: " 'When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' " (See *People v. Perry* (1972) 7 Cal.3d 756, 788 [evidence against codefendant admitted pursuant to Evidence Code section 356 without limiting instruction], overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 28.)

Appellant argues that Kelley's statement is hearsay. Evidence Code section 356 provides that where one party introduces part of a conversation, the opposing party may admit any other part necessary to place the original excerpts in content. (*People v. Pride* (1992) 3 Cal.4th 195, 235.) "By its terms section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject*, and (2) it is necessary to make the already introduced conversation *understood*." (*People v. Gambos* (1970) 5 Cal.App.3rd 187, 192.) The trial court did not error in overruling the hearsay objection.

The statement was admissible to show Kelley's state of mind (Evid. Code, § 1250) and to show that Kelley already knew appellant was the shooter, had revealed the information in a prior interview, and that Detective Heck did not feed information to Kelley. "[A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

Appellant's assertion that Kelley's out–of-court statement violates the Confrontation Clause also fails. Appellant did not object to the evidence on that ground and forfeited the claim. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166.) Forfeiture aside, the Confrontation Clause does not bar the use of out-of-court statements admitted for purposes other than establishing the truth of the matter asserted. (*Crawford v. Washington* (2012) 541 U.S. 36, 60, 68 [158 L.Ed.2d 177, 203]*: People v. Mendoza* (2007) 42 Cal.4th 686, 697-699 [no confrontation clause violation where out-of-court statement admitted to explain defendant's state of mind].) Evidence Code section 356 is a rule founded not on reliability, but on fairness, and hearsay statements admitted under that statute are not subject to *Crawford*. (*People v. Vines* (2011) 51 Cal.4th 830, 862, quoting *People v. Parrish* (2007) 152 Cal.App.4th 263, 271-274; see also; *People v. Banos* (2009) 178 Cal.App.4th 483, 499, fn. 7.)

The alleged error in admitting Kelley's out-of-court statement was harmless under any standard of review. Appellant vowed to avenge the death of a fellow gang member, armed himself, and drove around a rival gang's neighborhood looking for Hoover targets. Jackie Wynn saw a small black man run from the bus stop moments after Love was shot. Hours later, appellant bragged about killing a "Snoover nigger," kissed his gun, and said "That was for you Baby Hangout." A year later, in a recorded jailhouse conversation, appellant confided with Kelley that he shot a man at the bus stop. Appellant identified his accomplices and explained how the getaway car ran out of gas.

Threats on Prosecution Witness Weisberg

Appellant contends that the trial court erred in receiving testimony that Johrod Ying, a Denver Lanes gang member, threatened Kathryn Weisberg before trial.

Weisberg testified that Ying "called me a snitch and he beat me up basically because I was snitching on Chaos and Tick Tock."

The trial court admonished the jury: "There is no evidence that either defendant initiated or had anything to do with this individual who assaulted Ms. Weinberg. Everybody understand that?" It is presumed that the jury understood and followed the instruction. (*People v. Panah* (2005) 35 Cal.4th 395, 492.)

The trial court did not abuse its discretion in finding that that the probative value of the evidence outweighed the potential for prejudice. (Evid. Code, § 352; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.) Testimony that Weisberg was threatened by a Denver Lanes gang member was properly admitted to explain why she afraid to testify and placed in witness protection. (Evid. Code, § 780, subds. (f) & (j); *People v. McKinnon* (2011) 52 Cal.4th 610, 668.) "[T]here is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1142.) But for Weisberg's testimony that she was threatened for snitching, it is not reasonably likely that appellant would have received a more favorable verdict.

Minimum Parole Eligibility Period

Appellant was sentenced to 50 years to life state prison.[5] The abstract of judgment states that appellant "is to serve a minimum parole eligibility period of 25 years pursuant to PC section 186.22(b)(1)(C). . ."

Appellant argues, and the Attorney General concedes, that the abstract of judgment should be amended to reflect a minimum parole period of 15 years. Where a defendant is convicted of murder with a gang enhancement and receives an indeterminant "years to life" term, the sentencing court should impose the 15-year

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[5] Appellant was sentenced to 25 years to life for first degree premeditated murder and a consecutive term of 25 years to life on the firearm use enhancement (§ 12022.53, subd. (d).) The trial court stayed the other firearm enhancements (12022.53, subds. (b), (c) & (e)) and stated that because "the gang allegation was found true, the minimum parole period will be at least 25 years."

minimum parole eligibility term set forth in section 186.22, subdivision (b)(5). (See *People v. Lopez, supra,* 34 Cal.4th at pp. 1004, 1006-1007.) .

Conclusion

The judgment is affirmed with directions to modify the abstract of judgment to reflect that appellant must serve a minimum of 15 years before he is eligible for parole. The sentence remains the same: 50 years to life with possibility of parole. The clerk of the superior court is directed to forward a certified copy of the amended of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Mark S. Arnold, Judge

Superior Court County of Los Angeles

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.